

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

CUSTOMER NO. 22927

Appellants: Andrew S. Van Luchene, John C. Caine, Kathleen M. Van
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Anderson
Application No.: 09/586,742
Filed: June 5, 2000
Title: SYSTEMS AND METHODS FOR FACILITATING A
TRANSACTION BY MATCHING SELLER INFORMATION
AND BUYER INFORMATION

Attorney Docket No.: 99-091

Group Art Unit: 3625
Examiner: Yogesh C. Garg

APPEAL BRIEF

**BOARD OF PATENT APPEALS
AND INTERFERENCES**

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Commissioner for Patents
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Appellants hereby appeal to the Board of Patent Appeals and Interferences from the decision of the Examiner in the Final Office Action mailed January 6, 2006 (Part of Paper No./Mail Date 20051230), rejecting claims **95-97**. This Appeal Brief is filed subsequent to a Notice of Panel Decision from Pre-Appeal Brief Review, mailed on May 1, 2006 (Part of Paper No./Mail Date 42606), directing Appellants to "Proceed to Board of Patent Appeals and Interferences".

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REAL PARTY IN INTEREST

The present application is assigned to Walker Digital, LLC, 2 High Ridge Park, Stamford, CT 06905.

RELATED APPEALS AND INTERFERENCES

No interferences or appeals are known to Appellants, Appellants' legal representative, or assignee that will directly affect, be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

Claims **95-97** and **109-137** are pending in the present application.

Claims **95-97** are being appealed.

STATUS OF AMENDMENTS

No amendments were filed subsequent to the Final Office Action mailed January 6, 2006, the rejections of which are being appealed herein.

SUMMARY OF CLAIMED SUBJECT MATTER

Concise explanations of the independent claims being appealed, and the dependent claims being specifically argued, are provided below. The summaries include sufficient information about the claimed subject matter so that an informed review of the Examiner's adverse determination of patentability can be made.

As required by 37 C.F.R. § 41.37(c)(1)(v), reference is made to the Specification and Drawings, as appropriate. Any such reference:

- (i) is by way of example of the claimed subject matter only;
- (ii) is to be considered as potentially useful in clarifying the particular subject matter of the particular independent claim being explained (and not other claims or "the invention" as a whole), unless explicitly stated otherwise; and
- (iii) is not to be considered as broadening or narrowing the scope of any recited term from its meaning to one of ordinary skill in the art, unless explicitly stated otherwise.

Of the claims being appealed, claim **95** is independent.

1. Claim 95

Independent claim **95** recites a method that provides for *receiving, via a computer network, seller offer information, the seller offer information comprising information indicative of: (i) a seller, (ii) an item being offered for sale by the seller, (iii) a price at which the item is being offered for sale, and (iv) one or more characteristics of the item.* See, for example, Specification, pg. 5, lines 23-24; pg. 5, lines 29-30; pg. 6, lines 4-5; pg. 6, line 10; pg. 6, lines 15-16; pg. 6, lines 21-22; pg. 6, lines 26-27; pg. 7, lines 1-2; pg. 9, lines 5-10; pg. 10, lines 24-30; pg. 14,

lines 7-8; pg. 15, line 30 to pg. 17, line 3; pg. 22, lines 19-20; pg. 24, lines 29-30; pg. 25, lines 8-9; pg. 25, lines 13-14; pg. 25, lines 21-22; pg. 26, lines 6-11; FIG. 4; pg. 28, line 11 to pg. 29, line 17; FIG. 6; pg. 31, line 13 to pg. 32, line 28; FIG. 14, step 1402; pg. 40, lines 3-12; FIG. 15, step 1502; pg. 44, line 20-23; FIG. 16, step 1602; pg. 45, line 25-27; FIG. 17, step 1702; pg. 47, lines 5-6; FIG. 18B; FIG. 18B, step 1820; pg. 47, lines 27-29; FIG. 19, step 1906; pg. 48, lines 12-13; FIG. 23, step 2302; and pg. 51, lines 7-9.

Claim **95** further provides for *determining, based on the one or more characteristics of the item, a quality class of the item*. See, for example, Specification, pg. 11, lines 3-14; pg. 14, lines 23-28; pg. 19, lines 8-31; pg. 20, lines 11-20; pg. 21, lines 14-16; pg. 26, line 16; pg. 30, line 11-20; pg. 31, line 30 to pg. 32, line 8; FIG. 8; pg. 33, line 22 to pg. 34, line 18; pg. 42, lines 14-22; pg. 44, line 28 to pg. 45, line 2; pg. 47, lines 14-26; and pg. 47, line 29 to pg. 48, line 2.

Claim **95** further provides for *receiving buyer offer information, the buyer offer information comprising information indicative of: (i) a buyer, (ii) an item the buyer desires to purchase, (iii) a price the buyer is willing to pay for the item the buyer desires to purchase, and (iv) a desired quality class of the item*. See, for example, Specification, pg. 5, lines 24-25; pg. 6, lines 5-6; pg. 6, line 12; pg. 6, line 17; pg. 6, lines 27-28; pg. 7, line 3; pg. 9, lines 11-16; pg. 10, lines 24-31; pg. 14, lines 6-7; pg. 14, lines 9-22; pg. 15, line 3 to pg. 17, line 3; pg. 18, lines 9-10; pg. 19, lines 8-31; pg. 21, lines 13-16; pg. 22, lines 11-12; pg. 22, lines 19-20; pg. 24, lines 29-30; pg. 25, lines 9-10; pg. 25, lines 17-18; pg. 25, lines 22-23; pg. 26, lines 6-11; FIG. 3; pg. 27 to pg. 28, line 7; FIG. 5; pg. 29, line 24 to pg. 31, line 9; FIG. 14, step 1404; pg. 40, lines 13-22; FIG. 16, step 1604; pg. 45, line 27-29; FIG. 17, step 1702; pg. 47, lines 5-6; FIG. 18A; FIG. 18A, step 1802; pg. 47, lines

12-17; FIG. 19, step 1902; pg. 48, lines 9-11; FIG. 20A, FIG. 20B, FIG. 20C; pg. 48, lines 21-22; pg. 48, lines 24-27; pg. 49, lines 3-12; FIG. 21, step 2102; pg. 49, lines 28-29; FIG. 22, step 2202; pg. 50, line 13; FIG. 23, step 2304; and pg. 51, lines 9-10.

Claim **95** further provides for *receiving credit card account information associated with the buyer*. See, for example, Specification, pg. 5, lines 27-28; pg. 6, line 14; pg. 6, lines 19-20; pg. 7, lines 3-4; pg. 9, lines 18-19; pg. 24, lines 13-21; pg. 25, line 12; pg. 27, lines 27-29; pg. 44, lines 11-19; FIG. 23, step 2304; and pg. 51, line 9.

Claim **95** further provides for *storing the seller offer information and buyer offer information*. See, for example, Specification, pg. 21, lines 4-7; pg. 26, lines 12-15; and pg. 48, lines 3-6.

Claim **95** further provides for *determining, via a processor, whether the item desired for purchase by the buyer and the item being offered for sale by the seller correspond*. See, for example, Specification, pg. 5, lines 25-26; pg. 6, lines 18-19; pg. 9, lines 17-22; pg. 10, lines 28-29; pg. 11, lines 1-2; pg. 11, lines 15-25; pg. 12, lines 9-21; pg. 18, line 10; pg. 20, lines 21-27; pg. 21, lines 14-23; pg. 22, lines 12-18; pg. 22, lines 24-31; pg. 23; pg. 24, lines 1-11; pg. 25, lines 11-12; pg. 26, line 17; pg. 30, lines 11-20; pg. 31, line 30 to pg. 32, line 8; FIG. 9; pg. 34, line 22 to pg. 36, line 23; FIG. 10; pg. 38, lines 29-30; pg. 39, lines 3-4; FIG. 14, step 1408; pg. 42, line 6 to pg. 44, line 10; FIG. 17; pg. 47, line 4-11; FIG. 19; pg. 48, line 7-9; pg. 48, lines 15-19; FIG. 21; pg. 49, lines 26-27; pg. 50, lines 5-6; FIG. 23, step 2306; and pg. 51, line 11.

2. Claim 96

Dependent claim 96 recites the method of claim 95, *wherein it is determined that the item desired for purchase by the buyer and the item being offered for sale by the seller do not correspond, further comprising: providing the buyer an opportunity to commit to buy the item desired for purchase by the buyer if a corresponding item being offered for sale can be found at a later time.* See, for example, Specification, pg. 11, lines 26-29; pg. 17, line 28 to pg. 18, line 2; pg. 21, lines 4-9; pg. 21, lines 19-20; pg. 41, lines 8-11; pg. 44, lines 11-19; pg. 48, lines 13-14; pg. 50, lines 15-29; and pg. 52, lines 16-22.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

- Claims **95-97** stand rejected under 35 U.S.C. §102(e) as being allegedly anticipated by U.S. Patent No. 6,598,026 (hereinafter “Ojha”).

ARGUMENTS

1. Summary of Arguments

The rejections fail for various reasons.

- All of the rejections fail for failure to establish a *prima facie* case. The Examiner has not provided any factual findings in support of any rejection, has not provided substantial evidence in support of any rejection. Accordingly, without more and according to law, Appellants are entitled to allowance of the claims.
- The rejections for anticipation are based on improper and misguided interpretations of the cited references. The Examiner has not presented a *prima facie* case of anticipation at least because the Examiner has not properly applied the cited reference to show how all limitations of the pending claims are taught or suggested.

Accordingly, the rejections are inappropriate and Appellants respectfully request that the rejections be reversed.

2. Form of Appeal Brief

In the arguments herein, limitations of the claims are indicated in *italics*, claim numbers are indicated in **bold**, and the references of record are indicated by underlining.

In separate arguments of patentability of different Groups of claims, Appellants have, where possible, referred to prior arguments to avoid undue repetition.

In the arguments below, Appellants may refer to:

The First Office Action, which was mailed on July 9, 2003 (as part of Paper No./Mail Date 8);

The Second Office Action, which was mailed on February 19, 2004 (as part of Paper No./Mail Date 10);

The Third Office Action, which was mailed on October 5, 2004 (as part of Paper No./Mail Date 20040921);

The Fourth Office Action, which was mailed on April 18, 2005 (as part of Paper No./Mail Date 20050408);

The Final Office Action, which is the office action the rejections of which are being appealed herein, which was mailed on January 6, 2006 (as part of Paper No./Mail Date 20051230);

The Response to the First Office Action, which was mailed by Appellants on November 7, 2003;

The Response to the Second Office Action, which was mailed by Appellants on June 24, 2004;

The Response to the Third Office Action, which was mailed by Appellants on January 17, 2005;

The Response to the Fourth Office Action, which was mailed by Appellants on October 18, 2005; and

The Request for Pre-Appeal Brief Review, which was mailed by Appellants on April 4, 2006.

4. Applicable Law of *Prima Facie* Case and Substantial Evidence

4.1. Prima Facie Burden

If examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to grant of the patent. In re Oetiker, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

During examination, claims are given their broadest reasonable interpretation consistent with the specification. In re Hyatt, 211 F.3d 1367 (Fed. Cir. 2000). The “PTO applies to verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in applicant’s specification.” In re Morris, 127 F.3d 1048, 1054-55 (Fed. Cir. 1997).

4.2. Substantial Evidence is Required of All Factual Findings

All findings of fact by the U.S. Patent and Trademark Office must be supported by substantial evidence within the record. In re Gartside, 203 F.3d 1305, 1315, 53 USPQ2d 1769, 1775 (Fed. Cir. 2000).

The Supreme Court has described "substantial evidence" in the following manner:

“substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . Mere uncorroborated hearsay or rumor does not constitute substantial evidence.”

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938); See also, Dickinson v. Zurko, 527 U.S. 150, 162, 50 U.S.P.Q.2D 1930, 144 L. Ed. 2d 143, 119 S. Ct. 1816 (1999) ("Zurko III").

Similarly "review under this standard involves an examination of the record as a whole, taking into consideration evidence that both justifies and detracts from the agency's decision." Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88, 95 L. Ed. 456, 71 S. Ct. 456 (1951); Zurko III, 527 U.S. at 162. "[D]eficiencies of the cited references cannot be remedied by the Board's general conclusions about what is 'basic knowledge' or 'common sense.'" In re Zurko, 258 F.3d 1379, 1385, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001); In re Lee, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002).

"[D]eficiencies of the cited references cannot be remedied by the Board's general conclusions about what is 'basic knowledge' or 'common sense.'" In re Zurko, 258 F.3d 1379, 1385, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001); In re Lee, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002).

5. 35 U.S.C. §102(e) Rejections - Ojha

Claims **95-97** stand rejected under 35 U.S.C. §102(e) as being allegedly anticipated by Ojha. Appellants traverse these rejections.

These rejections are improper because the Examiner has not made out a *prima facie* case of anticipation with respect to any pending claim. Further, the reference does not anticipate any of the pending claims because the reference does not disclose each element of any single claim.

5.1. Proper Legal Standard for Anticipation

Anticipation requires identity of the claimed process and a process of the prior art; the claimed process, including each step thereof, must have been described or embodied, either expressly or inherently, in a single reference. Minnesota Min. & Mfg. Co., v. Johnson & Johnson Orthopedics, Inc., 976 F.2d 1559; 24 U.S.P.Q.2D 1321 (Fed. Cir. 1992); Glaverbel S.A. v. Northlake Mkt'g & Supp., Inc., 45 F.3d 1550; 33 U.S.P.Q.2D 1496 (Fed. Cir. 1995). "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631; 2 U.S.P.Q.2D (BNA) 1051 (Fed. Cir. 1987).

The elements of the claim must either be inherent or disclosed expressly in the reference. Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560; 7 U.S.P.Q.2D 1057 (Fed. Cir. 1988).

There must not be any differences between the claimed invention and the prior art disclosure, as viewed by a person of ordinary skill in the art, for anticipation to exist. Scripps Clinic & Res. Found. v. Genentech, Inc., 927 F.2d 1565; 18 U.S.P.Q.2D 1001 (Fed. Cir. 1991). Thus, the absence of any claim element from the reference negates anticipation. Kloster Speedsteel AB v. Crucible Inc., 793 F.2d 1565; 230 USPQ 160 (Fed. Cir. 1986).

Further, "[f]or a prior art reference to anticipate a claim, the reference must disclose each and every element of the claim with sufficient clarity to prove its existence in the prior art. See In re Spada, 911 F.2d 705, 708, 15 U.S.P.Q.2D 1655, 1657 (Fed. Cir. 1990) ('The [prior art] reference must describe the applicant's claimed invention sufficiently to have placed a person of ordinary skill in the field

of the invention in possession of it.’ (citations omitted)). Although this disclosure requirement presupposes the knowledge of one skilled in the art of the claimed invention, that presumed knowledge does not grant a license to read into the prior art reference teachings that are not there. An expert’s conclusory testimony, unsupported by the documentary evidence, cannot supplant the requirement of anticipatory disclosure in the prior art reference itself. See Jamesbury Corp. v. Litton Indus. Prods., Inc., 756 F.2d 1556, 1563, 225 U.S.P.Q. 253, 257-58 (Fed. Cir. 1985)”. Motorola, Inc. v. Interdigital Tech. Corp., 121 F.3d 1461; 43 USPQ 2d. 1481 (Fed. Cir. 1997).

The PTO is permitted to give claim language its “broadest reasonable interpretation” during prosecution. The broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach. In re Cortright, 165 F.3d 1353, 1359, 49 USPQ2d 1464, 1468 (Fed. Cir. 1999). “[I]t would be unreasonable for the PTO to ignore any interpretive guidance afforded by the applicant’s written description...: as an initial matter, the PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant’s specification.” In re Morris, 127 F.3d 1048, 1053-54 (Fed. Cir. 1997).

5.2. Claims 95-97

Appellants respectfully assert that the Examiner has failed to show how limitations of claims **95-97** are taught or suggested by Ojha. "A claim is anticipated

only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987); MPEP §2131. Accordingly, the Section 102(e) rejections of claims **95-97** are improper, and should be reversed.

5.2.1. Ojha fails to teach or suggest: *determining, based on the one or more characteristics of the item, a **quality class of the item*** (claims **95-97**)

Appellants incorporate by reference herein the arguments made with respect to the above-quoted limitation of claims **95-97** that were presented in both the Response to the Fourth Office Action and the Request for Pre-Appeal Brief Review.

In short, those arguments describe how Ojha fails to teach or suggest the limitation of: *determining, based on the one or more characteristics of the item, a **quality class of the item***. Ojha, for example, fails to describe or contemplate a "quality class" as recited in claims **95-97** and as defined by Appellants' specification.

The Examiner's response (Final Office Action, pg. 6, lines 3-5) to Appellants' arguments (from the Response to the Fourth Office Action) indicates that the Examiner is misinterpreting Ojha (and/or the pending claims). The Examiner argues, for example, that "[d]enoting the desired model with product specificities such as Thinkpad 600 denotes the level of quality of laptop computer the buyer is looking for." Final Office Action, pg. 6, lines 3-5.

Appellants respectfully re-iterate (See, Request for Pre-Appeal Brief Review, Section II.A.) that model information is not equivalent to a "quality class"

as set forth in Appellants' specification as filed. While different models may certainly be associated with different qualities, Ojha simply does not contemplate determining such qualities, categorizing items with respect to such qualities, or determining such qualities based on item characteristics. Nowhere, for example, does Ojha teach or suggest allowing a buyer to submit a bid for a laptop classified in a "better" quality class. See, for example, Specification, pg. 19, line 10; pg. 19, lines 29-31; and pg. 20, lines 11-20.

In contrast, claims **95-97** allow a buyer and seller to be matched based, at least in part, on a "quality class" of an item, *e.g.*, as opposed to being matched simply on a model number or price. Such embodiments facilitate, for example, a buyer to purchase a certain "quality" of item (*e.g.*, laptop) without needing to specify which model, what specific price, etc.

Accordingly, Appellants assert that the Examiner has failed to show how the above-quoted limitation of claims **95-97** is anticipated by Ojha. Appellants therefore respectfully request that the Examiner's Section 102(e) rejections of claims **95-97** be reversed.

5.2.2. Ojha fails to teach or suggest: *wherein it is determined that the item desired for purchase by the buyer and the item being offered for sale by the seller **do not correspond** (claim **96**)*

Appellants incorporate by reference herein the arguments made with respect to the above-quoted limitation of claim **96** that were presented in both the Response to the Fourth Office Action and the Request for Pre-Appeal Brief Review.

In short, those arguments describe how Ojha fails to teach or suggest the limitation *wherein it is determined that **the item desired for purchase by the buyer and the item being offered for sale by the seller do not correspond.*** Ojha, for example, fails to describe or contemplate the situation where “items do not correspond”, as recited in claim **96** and as described by Appellants’ specification. The Examiner’s response (Final Office Action, pg. 7-8) to Appellants’ arguments (from the Response to the Fourth Office Action) indicates that the Examiner is misinterpreting Ojha. The Examiner argues, for example, that “it is clear that when the buyer, in Ojha, in response to the seller’s list price bids a price lower than the list price for a specific desired product the item desired for purchase by the buyer and the item being offered for sale by the seller do not correspond” Final Office Action, pg. 7, last three lines to pg. 8, line 1.

Appellants respectfully note that in the case of an “auction-style” purchase, as described by the Examiner to exist in Ojha, it is the “prices” that do not correspond or match, not the items. In other words, the item that the buyer is bidding on is the item that the buyer wants, and only the price in Ojha is not settled.

In currently claimed embodiments such as recited in claim **96**, however, the actual item the buyer is looking for is not available, regardless of price. It is in this situation that the currently claimed embodiment of claim **96** recites providing the buyer the opportunity to purchase the desired item **if it becomes available in the future.**

Accordingly, Appellants assert that the Examiner has failed to show how the above-quoted limitation of claim **96** is anticipated by Ojha. Appellants therefore respectfully request that the Examiner’s Section 102(e) rejection of claim **96** be reversed.

CONCLUSION

Thus, the Examiner's rejections of the pending claims are improper at least because the Examiner has not provided a proper legal basis for rejecting any claim. Therefore, Appellants respectfully request that the Examiner's rejections be reversed.

If any issues remain, or if there are any further suggestions for expediting allowance of the present application, please contact Carson C.K. Fincham, at telephone number 203-461-7017 or via electronic mail at cfincham@walkerdigital.com.

Appellants do not believe any fee (*e.g.*, for an extension of time with which to file this Appeal Brief) is required at this time. However, if a fee should be necessary for the present Application at this time, please charge any such required fee to our Deposit Account No. 50-0271. Please credit any overpayment to Deposit Account No. 50-0271. Further, if a petition for an extension of time should be necessary to make this response timely, please grant such petition.

May 31, 2006
Date

/cckf54096/

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APPENDIX A - CLAIMS INVOLVED IN THE APPEAL

95. A method, comprising:

receiving, via a computer network, seller offer information, the seller offer information comprising information indicative of:

- (i) a seller,
- (ii) an item being offered for sale by the seller,
- (iii) a price at which the item is being offered for sale, and
- (iv) one or more characteristics of the item;

determining, based on the one or more characteristics of the item, a quality class of the item;

receiving buyer offer information, the buyer offer information comprising information indicative of:

- (i) a buyer,
- (ii) an item the buyer desires to purchase,
- (iii) a price the buyer is willing to pay for the item the buyer desires to purchase, and
- (iv) a desired quality class of the item;

receiving credit card account information associated with the buyer;
storing the seller offer information and buyer offer information; and
determining, via a processor, whether the item desired for purchase by the buyer and the item being offered for sale by the seller correspond.

96. The method of claim 95, wherein it is determined that the item desired for purchase by the buyer and the item being offered for sale by the seller do not correspond, further comprising:

providing the buyer an opportunity to commit to buy the item desired for purchase by the buyer if a corresponding item being offered for sale can be found at a later time.

97. The method of claim 95, further comprising:

charging the credit card account associated with the buyer the price at which the item is being offered for sale; and
crediting the seller an amount based on the price at which the item is being offered for sale.

APPENDIX B – EVIDENCE

<NONE>

APPENDIX C – RELATED PROCEEDINGS

<NONE>